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In The
Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA, AND ARMET, INC.,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE STATES OF FLORIDA, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA WASHINGTON, WEST VIRGINIA, WYOMING, THE DISTRICT OF COLUMBIA, AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

The essence of the question presented by this case is whether States may bring prosecutions for fraud against persons who obtain charitable donations by misrepresenting the specific uses to which those donations will be put. The *amici* are 40 States, the District of Columbia, and the Commonwealth of Puerto Rico (the "*amici* States"), that believe the answer to this question is yes and that the decision of the Supreme Court of Illinois in *Ryan v. Telemarketing Associates, Inc.*, 763 N.E. 2d 289 (Ill. 2001), should accordingly be reversed.

The *amici* States are witnesses to a troubling development in the world of charitable solicitations. Individuals are using "charitable" fundraising as a "cover" for converting charitable donations to personal funds. These individuals include professional fundraisers, and, in some cases, directors and officers of purportedly charitable organizations themselves. All too often, these individuals invoke the First Amendment as a shield from otherwise legitimate enforcement efforts. They assert that the First Amendment fully protects their activities, as long as they provide token dollars to charitable purposes and token statements of "public awareness" to members of the donating public. *Amici* States do not mean to imply that a majority of charities are infected with this problem, but rather that the injection of fraud into the realm of charitable giving, immunized by the First Amendment, will chill charitable giving to the detriment of society as a whole.

This proceeding stands to affect two specific interests shared by the *amici* States. First, as with any situation involving fraud, the *amici* States have a strong interest in protecting their citizens from solicitations that procure donations through false pretenses regarding how donated funds will be used. This Court has previously recognized the constitutionality of States' efforts to prevent and punish fraud in the context of charitable solicitations. *See, e.g., Village of Schaumburg v. Citizens for a*

Better Environment, 444 U.S. 620, 637-38 (1980) ("Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly.").

Second, the *amici* States share a strong interest in ensuring that charitable assets are duly administered in a manner that encourages charitable donations and thereby maximizes the public benefits that may be offered by beneficent charitable organizations. Charitable contributions represent a significant public resource. They promote a wide range of important initiatives in areas such as medical and scientific research, social services, public health, education, the environment, civil rights, and legal aid. Yet these initiatives cannot succeed without popular support, and such support will come only where the public trusts that its donations will be used for purposes that donors intend to sponsor and are led to believe their donations will in fact sponsor.

SUMMARY OF ARGUMENT

The facts in *Ryan* exemplify a disturbing phenomenon: a fundraiser solicited financial contributions by leading donors to believe that donations would be used to provide specific charitable services, though the fundraiser knew an overwhelming percentage of the donated funds would never serve any such purposes. The Supreme Court of Illinois affirmed the dismissal of a fraud action against the fundraiser because, in that court's view, the fundraiser's actions were protected by the First Amendment. The court did not hold, or even suggest, that the claim brought by the Illinois attorney general was not a valid claim for fraud under state law. Rather, the decision relied solely upon this Court's First Amendment decisions to hold that the First Amendment negates an otherwise valid fraud prosecution under Illinois law. That decision was incorrect because this Court has never interpreted the First Amendment to bar an action for common law fraud and because all fundraising efforts are not entitled to the full protections of the First Amendment.

ARGUMENT

I. *RYAN* PRESENTS AN INCREASINGLY COMMON EXAMPLE OF FRAUD IN THE CONTEXT OF CHARITABLE SOLICITATION.

The facts underlying the complaint in *Ryan* are not complicated. Since 1989, and continuing through the present, Respondents contracted with VietNow to solicit funds on VietNow's behalf. The relevant contractual language obliged the fundraiser to remit to the charity only 15 percent, and in some cases only 10 percent, of the funds collected. Under the contracts, VietNow had no access to the names or addresses of its donors.

Based on these contracts, Respondents raised funds through telephone solicitors who contacted potential donors and told them that their donations would provide hungry, homeless, or injured Vietnam War veterans with food, shelter, and financial support. Donors were not told that less than 15 percent (or, in some cases, less than 10 percent) of their donations would be passed on to the charity, let alone that only part of that amount would eventually be used to support the charity's services, depending on the charity's practices. The affidavits attached to the Amended Complaint show that none of the donors would have given to VietNow had they known that so little of their charitable dollars would be applied to the described veterans programs. [J.A.107-94]

Although VietNow's contracts provided that Respondent was to "increase public awareness" of veterans' needs, the record shows that the content of the solicitation pitches delivered was *ad hoc* and not something that Respondents or VietNow prepared. (J.A. 32; 83, ¶ 67E) According to the Questionnaires, the actual solicitations on behalf of VietNow conveyed only enough information to enable the solicitor to make his pitch for money. In addition, none of the donors were told that their donation would be used for a public awareness campaign.

As the *amici* States show in the following sections, similar fund raising campaigns are increasingly common, and States must have the opportunity to pursue fraud claims where the facts warrant.

A. THE CONDUCT AT ISSUE IN *RYAN* IS INCREASINGLY PREVALENT AND THREATENS TO REDUCE THE PUBLIC BENEFITS GAINED FROM POPULAR SUPPORT OF CHARITABLE FUNDRAISING EFFORTS.

Modern solicitation efforts routinely evoke images of desperation in which persons will suffer cruel, undeserved hardships unless someone intervenes to alter that course -- intervention that will come, so the solicitor says, if donors will make the requested charitable contributions. This technique is applicable in many contexts. Potential donors may be told, for instance, that children in an area are starving and that donations will be used to provide them with life-sustaining food. Donations may be said to provide victims of abuse with care, counseling, or shelter from their abusers. Or, as in *Ryan*, solicitors may claim that donations will provide hungry, homeless, or injured Vietnam War veterans with food, shelter, and financial support. *See generally* Nicholas Barborak, *Saving the World, One Cadillac at a Time: What Can Be Done When a Religious or Charitable Organization Commits Solicitation Fraud?*, 33 AKRON L. REV. 577 (2000).

By painting a picture of the charitable works that donated funds will serve, fundraisers play directly upon the emotions of potential donors. Giving in response to such appeals is understandable, as support for persons less fortunate is a particularly noble and common human trait. Unfortunately, it is also a trait that may be exploited by those who would mislead donors about the uses intended for their contributions.

Professional fundraisers exploit the good-will of our citizens by picking the most popular charitable causes -- veterans relief, families of firefighters killed in the line of duty, terminally-ill children – and enter into contracts with charities where the fundraiser receives an exorbitant percentage of the funds collected. Not surprisingly, these fundraisers are able to raise millions of dollars nation-wide.[1]

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[1] According to New York's most recent annual report on telemarketing, paid fundraisers received $125.8 million, or 68.1%, of the $184.7 million raised in 588 telemarketing campaigns that targeted New Yorkers and others throughout the country. *See* NEW YORK STATE ATTORNEY GENERAL, PENNIES FOR CHARITY (2002), <www.oag.state.ny.us/charities/charities.html>. Of the New York campaigns, 73% resulted in payment to the fundraiser of at least 60%, and 25% resulted in the fundraisers' receiving over 80%. *Accord,* CONNECTICUT ATTORNEY GENERAL & CONSUMER PROTECTION COMMISSIONER, 2001 TELEMARKETERS REPORT, <www.cslib.org/attygenl/mainlinks/tabindex8.htm> (of $11,330,315 contributed by Connecticut residents in response to solicitations by paid telephone solicitors, $7,424,324, or 65.5%, was paid to fundraisers); COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S REPORT ON TELEMARKETING FOR CHARITY (2002), <http://www.ago.state.ma.us/charity/telrep01.pdf> (65% of all charitable contributions went to paid fundraisers; of 445 campaigns, 48% involved payment to fundraiser of over 70% of contributions, and 24% involved payment to fundraiser of over 90% of contributions); NORTH CAROLINA DEPT. OF SECRETARY OF STATE, ANNUAL REPORT OF THE CHARITABLE SOLICITATION LICENSING SECTION (2001), <www.secretary.state.nc.us/CSL/reports.asp#> ($66,554,046 raised in 437 campaigns, of which paid fundraisers retained $39,815,490 or 60% of funds contributed). A review of all fundraising campaign reports filed with the Pennsylvania Office of the Attorney General from January 1988 through December 17, 2002, shows 2,249 separate campaigns with gross contributions of $1,384,169,056; of that amount, only $631,474,266, or 45.6%, went to the charities, with the professional fundraisers retaining the

An increasing number of fundraisers are soliciting funds by touting specific services that donations will serve under circumstances where, as in *Ryan*, the fundraisers have full knowledge that an overwhelming percentage of the funds will not be used to support those services. For instance, federal officials in New York recently indicted an individual who formed a charitable organization purportedly to assist families of New York City police officers killed in the line of duty. *USA v. Justin Patrick White*, No. 02 Cr. 1111 (KTD), *Indictment* at ¶ 1 (S.D.N.Y. filed Aug. 19, 2002). He hired telemarketers who solicited donations by expressly inviting potential donors to ease the hardships on surviving widows and children through financial contributions, knowing that less than five percent of the funds collected would be used in that manner. *Id.* at ¶ 26. In fact, the telemarketers' script sheets told them to end calls quickly once a potential donor asked about the percentage of contributions provided to the widows and children because, the supposed charity presumed, persons with such knowledge would have no interest in donating funds. *Id.* at ¶ 13.

The Vermont Attorney General recently settled a charities fraud dispute involving three charities and a fundraiser who solicited donations on the charities' behalf. The fundraiser had represented to potential donors that money was being raised for particular services -- such as to provide urgent pain medication to critically ill cancer patients, to help local paralyzed veterans, and to provide medical equipment for local disabled children -- but, in addition to other concerns, the fundraiser kept between 84 and 91 percent of all donations, and with respect to one supposed service, no money whatsoever was used in its support. Consent Decree and Stipulation, *State of Vermont v. Civic Development Group et al.*, No. 863- 98CnC (Chittenden Super. Ct. filed Jan. 22, 2001).

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remaining 54.4%, or $752,694,740.

Similar circumstances can be seen in recently reported case law. For example, the opinion in *People v. Orange County Charitable Services*, 73 Cal. App. 4th 1054 (Cal. App. Ct. 1999), depicts the sordid tale of a individual who formed a network of charities in order to enter fundraising contracts with them and further subcontract the fundraising work to other entities. Under the contractual arrangements, the charities actually received 10 percent or less of the funds that were donated to the charities, despite the fact that donors were directly led to believe that their contributions would be spent on specific charitable services.

Charitable donors are particularly vulnerable to fraudulent misrepresentations by professional fundraisers because, in contrast to a purchase of a product or an investment, the donor does not receive anything in exchange for his or her donation. Thus, it is harder for the donor to verify the veracity of a particular solicitation. Justice Kennedy notes this situation in his concurrence to *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) where he argues that the State's interest in protecting charitable donors is greater than the State's interest in protecting the purchasers of products or services because "[t]he danger of a fraud arising from such sales is much more limited than from pure solicitation, because in the case of a sale the nature of the exchange tends to be clearer to both parties. *Id.* at 708.

With alarming frequency, persons are establishing fundraising businesses for the purpose of retaining 80 to nearly 100 percent of funds raised despite the fact that donors are led to believe that their donations will be used to help particular services performed by the charities the fundraisers purportedly seek to aid. To a somewhat lesser extent, the same is true with respect to so-called charities created for no purpose other than to serve as income sources for their creators, with nearly all donations being used for purposes other than the charitable services touted in the charities' fundraising efforts.

Citizens who have learned of these situations have begun complaining loudly for States to take action. The *amici* States have received a large number of complaints regarding solicitations to collect funds ostensibly intended to aid the victims of the September 11, 2001 terrorist attacks on the United States but which result in the fundraisers keeping substantially all of the donated funds. The Attorneys General of numerous States have begun the process of prosecuting those who mislead donors regarding the intended uses of their donations.

These complaints and prosecutions have apparently provoked the interests of the news media, which have begun to conduct independent investigations and to publicize deceptive charitable solicitation practices. For example, the front cover of a recent edition of the St. Petersburg Times ran a story entitled, "Charity 10%, firefighters union 90%." The article reported that, for the past five years, a Tampa, Florida firefighters union has used telemarketers to promote a camp for children burned by fire but spent less than 10 percent of the funds raised on that charitable service. The article begins:

> The callers ask for donations for Camp Hopetake, a summer retreat where children burned by fire get a once-a-year escape from the rest of the world. The Tampa firefighters union raises more than a half-million dollars in the name of these children every year. But most of the money doesn't go to the kids. Last year, for every $100 donated, less than $10 went to Camp Hopetake and other charities. Ninety percent went to the union.

David Karp, *Charity 10%, firefighters union 90%*, ST. PETERSBURG TIMES, at 1A (Jun. 30, 2002). The article continues with a detailed report of the union's solicitation practices, including an account of how the union's telemarketers made potential donors believe that the union's costs were below average, when in fact they were not, by emphasizing that the union did not utilize professional fundraisers. *See also*, Richard

T. Pienciak, *1.2M Raised but WTC Kin Get Zip*, NEW YORK DAILY NEWS, at 4 (Sept. 9, 2002). This article describes how only 4% of all donations received in 2001 were given out for scholarships for families of New York firefighters.

The public benefits when it learns that all charitable fundraisers are not necessarily credible regarding how donations will be used or that asking specific questions regarding the intended uses of funds is advisable by allowing individuals to avoid making contributions to finance activities they do not wish to support. At the same time, declines in the public's perception of charitable solicitors' trustworthiness play a direct role in reducing the overall amount of charitable support. *See* THE 21ST CENTURY DONOR: EMERGING TRENDS IN A CHANGING MARKET (Epsilon & Barna Research Group, Ltd., Sept. 2002); *see also* Harvey Lipman, *Survey Identifies Troubling Trends for Nonprofit Organizations*, CHRONICLE OF PHILANTHROPY, at 13 (Nov. 14, 2002).[2] The public is thus collectively harmed to the extent that this public distrust dissuades charitable giving by those who would otherwise support legitimate, beneficent charities that provide tremendous services to society at large.

In order to ensure the public's ability to rely on the representations of charitable fundraisers, and thereby to permit the public to receive the full benefits of a thriving community of

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[2] For additional survey results documenting the fragility of the public's trust in charities, *see* PRINCETON SURVEY RESEARCH ASSOCIATES, INC., BBB WISE GIVING ALLIANCE DONOR EXPECTATIONS SURVEY, FINAL REPORT (2001) ("SURVEY"), <http://www.give.org/news/Donor%20Expectations%20Survey.pdf>. According to the SURVEY, over a third of the adults polled believe that charities are less trustworthy than ten years ago (albeit a lower percentage than in 1993); 70% find it difficult to know whether a particular charity is legitimate; and three-fourths are of the opinion that at least 70% of a charity's expenditures should go toward programs as opposed to administrative and fundraising costs. *See* SURVEY at 10, 17 and 27.

charitable organizations, States must be able to hold charitable fundraisers legally responsible when they obtain donations through misrepresentations regarding how those funds will be used. Otherwise, fraudulent practices in the course of charitable fundraising will only continue to escalate, and the result will be an environment in which honest charities cannot maximize their ability to raise funds and provide charitable services, to the detriment of our entire society.

B. THE CONDUCT AT ISSUE IN *RYAN* SATISFIES THE COMMON LAW DEFINITION OF FRAUD.

If the statements allegedly made by the telemarketers in *Ryan* intentionally misled donors to believe that at least a substantial portion of their donations would actually be used to provide hungry, homeless, or injured Vietnam War veterans with food, shelter, and financial support, and if those donors relied on that understanding when they made their donations, then as asserted by the Attorney General of Illinois, the fundraiser committed fraud. The State of Illinois has given its Attorney General the authority to prosecute such conduct.

This result, under these facts, is not unique to the law of Illinois. Fraud is generally defined as a knowingly false representation of a material fact made with the intent to induce, and which does induce, another's detrimental reliance.[3] *E.g.*, 37

[3] Many jurisdictions impose liability for dishonest or misleading solicitations, but dispense with the common-law requirement of intent to defraud. *See, e.g.*, N.Y EXECUTIVE LAW §172-d(2). These laws were drafted this way in order to provide further protections to the donating public. The courts have upheld similar statutes in the consumer protection area on the theory that "defendants had created an atmosphere conducive to fraud." *People v. Compact Associates*, 22 A.D.2d 129, 131; 254 N.Y.S.2d 265, 267 (App. Div. 1964). Similar laws have been upheld by the federal courts.

AM. JUR. 2D *Fraud and Deceit* § 12 (1968); 37 C.J.S. *Fraud* §§ 2, 7 (1997); RESTATEMENT (SECOND) OF TORTS, § 525 (1977); *see also* RESTATEMENT (SECOND) OF TORTS, § 553 (defining liability for fraudulent misrepresentation inducing gift to third person). A statement's literal truth does not preclude the existence of fraud where the message taken as a whole carries a false implication of fact. 37 AM. JUR. 2D *Fraud and Deceit* § 42; 37 C.J.S. *Fraud* § 24; RESTATEMENT (SECOND) OF TORTS, § 529.

In addition to the common law claim of fraud, States have enacted statutory devices to protect the public from fraudulent activities. Statutes based on the Uniform Deceptive Trade Practices Act, adopted in a large number of States, routinely provide consumers general protection from unscrupulous business practices.[4] Many States utilize charitable solicitation regulations to prohibit fraudulent acts in the specific context of charitable fundraising.[5] Also, as in Illinois, States typically empower a state actor, such as the State's attorney general, to investigate suspected

See, e.g., FTC v. Amy Travel Service, Inc., 875 F.2d 564, 573-74 (7th Cir. 1989), *cert. denied*, 493 U.S. 954 (1989) ("[I]mposing a requirement that the FTC prove subjective intent to defraud on the part of the defendants would be inconsistent with the policies behind the FTCA and place too great a burden on the FTC.")

[4] *See, e.g.*, FLA. STAT. § 501.201 *et seq.*; DEL. CODE ANN. tit. 6, § 2511 *et seq.*; IND. CODE § 24-5-0.5-2 *et seq.*; MICH. COMP. LAWS § 445.901 *et seq.*; OHIO REV. CODE ANN. § 1345.01 *et seq.*; S.D. CODIFIED LAWS § 37-24-6.

[5] Florida's Solicitation of Contributions Act, for example, provides specific regulations regarding solicitors and is enforced by both the state's Attorney General and its Department of Agriculture and Consumer Services. FLA. STAT. Ch. 496. *See also, e.g.*, DEL. CODE ANN. tit. 6, § 2591 *et seq.*; IND. CODE § 23-7-8-7; KAN. STAT. ANN. § 17-1759 *et seq.*; MD. CODE ANN., BUS. REG. § 6-601 *et seq.*; MICH. COMP. LAWS § 400.271 *et seq.*; OHIO REV. CODE ANN. Ch. 1716; S.D. CODIFIED LAWS § 37-30-17.

fraudulent activity and, if appropriate, to initiate a suit in a *parens patriae*-type capacity for relief that may include an injunction, sanctions, or money damages.[6]

Under these common law and statutory actions, a fundraiser who tells a potential donor that his or her financial contribution will support a particular charitable service, and thereby represents that at least a substantial portion of the donation will be used in that manner, commits actionable fraud where the fundraiser knows that at least 85 or 90 percent of the funds will not be used to support those services.[7] How that portion of the donation is in fact spent is *irrelevant* once it is established that this portion will not be used to support the service promoted to the donor at the time of the solicitation.

Accordingly, the fraud prosecution undertaken by the Illinois Attorney General in *Ryan* is representative of suits that could be brought in numerous states based on the same underlying conduct. As the *amici* States show in the following section, the Supreme Court of Illinois erred in determining that the First Amendment prevents such actions.

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[6] *See, e.g.*, FLA. STAT. § 501.207; DEL. CODE ANN. tit. 6, § 2514; IND. CODE § 24-5-0.5-4; KAN. STAT. ANN. § 17-1773; MD. CODE ANN., BUS. REG. § 6-205; MICH. COMP. LAWS § 400.290; S.D. CODIFIED LAWS § 37-24-12 *et seq.*

[7] A review of VietNow's most recent form 990 tax return (for the year ended June 30, 2001), reveals that, in actuality, only 3.5% of expenses were devoted to any program activity; and only 1.4% ($48,793 of the $3,540,451 raised), was used as grants to help needy veterans. VietNow's revenues, fundraising and program expenses are reported in its IRS Form 990 for 2000, which is published by the California Attorney General on the internet at http://justice.hdcdojnet.state.ca.us/charitysr/default.asp, and summarized by the Better Business Bureau Wise Giving Alliance at http://www.give.org/reports/care2_dyn.asp

II. THE ILLINOIS SUPREME COURT INCORRECTLY HELD THAT THE FRAUDULENT ACTS CHARGED BY THE ILLINOIS ATTORNEY GENERAL ARE IMMUNIZED BY THE FIRST AMENDMENT.

In *Ryan*, the Illinois Supreme Court reached its conclusion by relying upon a trilogy of this Court's cases culminating in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988). That reliance was misplaced, as the *Riley* trilogy involved materially different circumstances and, indeed, the Court affirmatively stated in those cases that States may prosecute fraud in the context of charitable solicitations.

Each case in the *Riley* trilogy addressed concerns that are not present in *Ryan*. The first case, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), involved a state law that prohibited certain solicitations by any charitable organization that did not use at least 75 percent of its receipts for "charitable purposes." The second, *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), involved a similar provision, except that it exempted charities that were effectively prevented from raising contributions. In both cases, the Court held that the asserted justification for the statutes -- protecting the public from fraud -- were insufficient to overcome the charities' First Amendment right to speech. The essence of the Court's concern was the impermissibility of categorically equating fraud with a particular level of expenses, given the wide range of interests served and activities undertaken by various charities.

Riley concerned a state law that presumed the existence of fraud once a fundraiser's fees exceeded 35 percent, although the presumption could be rebutted. The law further required fundraisers to inform potential donors of the percentage of donations the fundraiser turned over to charities in the preceding 12 months. This Court held that both aspects violated the First Amendment. The presumption was invalidated because its

premise -- that use of more than 35 percent of donations towards fees alone suggested fraud -- was flawed and because noncommercial speakers should not bear the burden of rebutting a presumption that their speech is unlawful. The Court rejected the percentage disclosure because compelling that disclosure did not meaningfully inform donors about the uses that donations would serve and only applied to professional fundraisers; thus, the requirement was not narrowly tailored to meet the state's goal of disclosing how much of a donation would actually benefit a charity.

Though the *Riley* trilogy of cases invalidated statutes that spoke to how charitable donations were utilized, those cases do *not* support the proposition that the percentage of funds retained by a fundraiser is beyond examination where a fundraiser in fact represents the uses to which donations will be put. Yet it was in this sense that the Illinois Supreme Court misinterpreted this Court's precedents. The Illinois court reasoned that the fundraiser in *Ryan* would not have committed fraud had it disclosed the percentage of funds it would retain, and the court read the *Riley* trilogy to forbid States from imposing liability for the failure to disclose such information.

The Illinois Supreme Court's interpretation is unsupportable. At most, this Court's holdings preclude the use of certain percentages as a complete and independent basis for presuming fraud in charitable solicitations. By comparison, the Illinois Attorney General alleged in *Ryan* that the fundraiser had made misrepresentations regarding how donated funds would be used and that, among other things, the percentage of funds retained by the fundraiser pursuant to its contract with the charity demonstrated that the fundraiser's representations were false. Those misrepresentations, together with the specific circumstances of how donated funds were intended to be used and were in fact used, constitute additional facts that take this case far outside the circumstances at issue in *Riley*, *Munson*, and *Village of Schaumburg*.

The Illinois Supreme Court also ignored this Court's clear statements in those cases that States are free to prosecute fraud when it occurs in the context of charitable solicitations. *Village of Schaumburg* expressly stated that "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637. In *Riley*, the Court stated:

> [W]e do not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it.

487 U.S. at 795. In this case the Illinois Attorney General attempted to follow these pronouncements by bringing a fraud prosecution based on specific, completed events.

In holding that the *Riley* trilogy prohibited that prosecution, the Illinois Supreme Court did not find that the facts alleged by the attorney general failed to show fraud. Instead, the state court simply held that the First Amendment immunized the telemarketers against prosecution. The decision below, if upheld, would support the argument that even a major inconsistency between express or implied representations and actual use of donations is immune from challenge on grounds of fraud as long as the misrepresentations are somehow related to high fund raising costs. If this view were to prevail, nothing would prevent a paid fundraiser from telling prospective donors that their contributions will be used for denominated purposes when in fact, year after year, 85, 95 or 99 percent of those contributions are retained by the fundraiser—even if it is clear that donors were in fact mislead by the statements.

The most disturbing implication of the Illinois Supreme Court's decision is that the "fundraising cost" argument may arguably trump any evidence that a state can offer at trial. Here, for instance, the Attorney General was not allowed to introduce evidence of a number of factors relevant to the existence of fraud:

the totality of the fundraiser's representations to donors[8]; the extent to which solicitations had (or lacked) informational or persuasive content[9]; whether and how telefunders departed from prepared scripts; how the solicitation message was understood by donors[10]; and the historic relationship between the fundraiser and the officers of the charity. Yet the development of a full factual record is essential to fair consideration of any First Amendment as-applied defense such as that involved here. *See Bartnicki v. Vopper*, 532 U.S. 514, 524 (2001).

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[8] For instance, Respondents sent donors an invoice stating that a "substantial portion" of the proceeds would be spent on program service. *See* State of Illinois' Complaint, Ex. F. [R.C. 113]

[9] The court below was seemingly impressed with the fact that the fundraising contract called for a direct public awareness campaign on behalf of the charity. In light of the recognition in *Riley* that charities may reap substantial benefits from the dissemination of information, such provisions are regularly inserted in fundraising contracts. However, the inclusion of such a provision is not conclusive evidence that such a campaign is actually conducted, and the State of Illinois was not given the opportunity to document the non-existence or insignificance of such a campaign. Indeed, VietNow's IRS Form 990 for the year 2000 shows no such "program awareness" educational expense, casting doubt on the validity of the educational mission associated with the fundraising activity. *See supra*, note 7.

[10] The Illinois Attorney General offered 44 affidavits of donors who believed that they were misled into contributing. [Joint Appendix at 107-94]

III. THE DECISION BELOW REFLECTS AN IMPROPER PERCEPTION THAT ALL FUNDRAISING EFFORTS CONSIST SOLELY OF NON-COMMERCIAL, FULLY PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

In considering the specific facts presented by Illinois' appeal, the Court should revisit certain assumptions underlying its decision in *Riley* and inquire into whether these have proven to be accurate in light of the experience of State regulatory and law enforcement agencies. In particular, the Court should consider whether, in some cases, paid fundraiser solicitations on behalf of charities can be sufficiently devoid of informative and persuasive content, and so directed at profiting the fundraiser, as to take on the character of commercial speech.

In *Riley*, the Court sought to protect the "legitimate efforts of professional fundraisers to raise money for the charities they represent." 487 U.S. at 799. The Court paid particular attention to "the realities faced by small or unpopular charities, which must often pay more than 35% of the gross receipts collected to the fundraiser due to the difficulty of attracting donors." 487 U.S. at 793. The Court also noted that fundraising costs may be high because a charity chooses to receive a large sum as measured by the dollars donated rather than the percentage of donations remitted, or because a campaign is "designed to sacrifice short-term gains in order to achieve long-term, collateral, or non-cash benefits." 487 U.S. at 792.

The scenarios posited by the Court do occur. However, the States have witnessed another phenomenon in the field of charitable fundraising. A significant number of campaigns regulated by the States have turned out to involve charities that are not new or discernibly unpopular, on whose behalf fundraisers have had little trouble attracting donors, but which, year after year, have contracted with professional fundraisers who retain the

lion's share of the contributions made.[11] Indeed, such campaigns

[11] State records reflect percentages to many charities that are low *year after year*. For example, the New York Attorney General has examined 87 instances in which charities paid 75% or more of their gross contributions to the same professional fundraiser in each of 5 or more years during the period 1994-2001. *See* NEW YORK STATE ATTORNEY GENERAL, PENNIES FOR CHARITY (1995-2002), <www.oag.state.ny.us/charities/charities.html>. In 48 (55.2%) of these instances, the charity paid the same or a higher fundraising percentage in the most recent year than it paid in the initial year, and in 31 (35.6%) of these instances, the charity never reduced its fundraising percentage after the first year. Similarly, in Connecticut, of 110 in-state charities and public safety organizations identified from public filings with the Connecticut Attorney General's Office that conducted fundraising campaigns in three or more years during the period 1996-2001, 59 (53.6%) paid the same or a higher fundraising percentage in the most recent year than in the initial year; and 49 (44.5%) never reduced their fundraising percentage after the first year. The following are three of many specific examples from campaign reports on file with the States: AMVETS, American Veterans of WWII, Korea and Vietnam, utilizing the same professional fundraiser, American Trade and Convention Publications, reported gross contributions for the years 1999 through 2001 of $2,758,368, $4,443,094 and $4,819,701, respectively, but received only $500,000 for each reporting period, revealing steadily *declining* receipts as a percentage of gross contributions (18.1%, 11.3% and 10.4%, respectively), in spite of the fact that gross contributions *increased* each year (on file with Office of Minnesota Attorney General); American Health Assistance Association, utilizing Public Interest Communications for the years 1999 through 2001, reported gross contributions of $261,356, $269,474, and $240,775, respectively, but receipts of only 17.7%, 2.8% and 1.7%, respectively (*id.*); Cancer Fund of America, utilizing Civic Development Group, reported gross contributions from September 2000 through September 2002 of $1,008,102, $890,549 and $1,289,908, respectively, but receipts of only 12%, 12% and 11.6%, respectively, with the lowest percentage occurring in 2002, again the year in which gross contributions were highest (on file with Office of Pennsylvania

have stood on its head the "more than 35%" figure alluded to in *Riley*, by directing to the fundraiser 85% or more of donations on a repeated basis.[12] Moreover, in many campaigns, there has been virtually no public education or advocacy, only a passing, *pro forma* reference in a script to the charity and its mission.[13]

Attorney General).

[12] *See, supra,* note 1.

[13] In general, telephone solicitation scripts begin by identifying the fundraiser and nonprofit client and end with a request for a donation. In between, something may be stated as to the organization's activities, mission, beneficiaries, etc., but in many instances, the informational and persuasive content is minimal. For example, in this respect the script for one of the fundraisers for VietNow states only, "The reason for the call is every year we help our disabled veterans in the area. VietNow helps homeless and disabled veterans in the State of Oregon and throughout the nation." Model script for Charity Services, Inc. (2001-2002) (on file with Oregon Department of Justice). Note that the script offers no explicit information regarding the plight of veterans, how an interested solicitor may help (beyond giving money), or even how the charity will assist veterans. For some of the many examples of publicly-accessible fundraising scripts that contain similarly perfunctory information, *see* Reese Brothers, Inc., on behalf of National Care Giving Foundation (2001-2003), Four Winds Marketing on behalf of Oregon Chapter of National Federation of the Blind (2001), Gatti Productions on behalf of Professional Fire Fighters of Grants Pass (2002), Legacy Telemarketing Corp. on behalf Lane County Chapter of American Red Cross (2000), and Suihkonen & Associates, Inc., on behalf of Douglas County Shrine Club (2002-2003) (all on file with Oregon Department of Justice); United Funding Organization, Inc., on behalf of Police Protective Fund (2000-2001) and Callan Publishing, Inc., on behalf of Virginia Association of Chiefs of Police (2001-2002) (both on file with Virginia Department of Agriculture & Consumer Services); All-Pro Telemarketing Associates Corp. on behalf of Children's Charity Fund (filed 2001), Fundraisers, Inc., on behalf of Coalition of Police & Sheriffs (filed 2002), TCI America,

Such fundraising campaigns raise an important issue for this Court: that of articulating the line between charitable speech to which the fundraiser's commercial involvement is ancillary—which is fully protected under the First Amendment—and commercial speech in which the charity is only a minor player. In *Riley*, the Court reasoned that the activity of professional fundraisers does not retain its commercial character when it is "inextricably intertwined" with otherwise fully protected speech. 487 U.S. at 796. There the Court declined to apply a lower degree of constitutional scrutiny to the commercial portion of the solicitation and a higher degree to the charitable portion. The Court focused instead on the *overall* character of the speech:

> Our lodestars in deciding what level of scrutiny to apply [to the compelled disclosure] must be *the nature of the speech taken as a whole* and the effect of the [mandated disclosure] thereon. . . . Regulation of a solicitation "must be undertaken with due regard for the reality that solicitation is *characteristically* intertwined with informative and perhaps persuasive speech . . ."

Id. (quoting *Schaumburg*, 444 U.S. at 632) (emphasis added).

State regulatory and law enforcement action has shed light on campaigns where the nature of the speech "taken as a whole" is arguably commercial, since year after year the solicitations have included only the barest reference to informative, much less persuasive, speech, and the vast majority of the donated dollars has gone to the fundraiser for reasons other than "getting one's message across." As the Court noted in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 475 (1989), "communications can 'constitute commercial speech

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Inc., on behalf of North Haven Fire Fighters Assn. (filed 2002), and East Coast Marketing Group, on behalf of East Lyme Police Union (filed 2002) (all on file with Office of Connecticut Attorney General).

notwithstanding the fact that they contain discussions of important public issues'" (quoting *Bolger v. Youngs Drug Products, Inc.*, 463 U.S. 60, 67-68 (1983)). A campaign where 85 to 90 cents of every dollar contributed has gone to a paid fundraiser and the charity-related speech has been limited to a request for a contribution to support a given cause should be susceptible of being considered commercial speech for purposes of First Amendment analysis.

It should be stressed that the States seek no presumption of illegality here, no rule of thumb derived from the percentage split between fundraiser and charity. Rather, they wish to reaffirm their historic and Constitution-compatible role of protecting their citizens from fraud on a case-by-case basis. As the Court in *Riley* stressed, "we do not suggest that States must sit idly by and allow their citizens to be defrauded. [Each state] has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it." 487 U.S. at 795. In undertaking such enforcement actions, however, the States need to be free to present in court all of the facts surrounding the fundraising campaign. They must have the opportunity to show that although a campaign is conducted in the name of a charitable organization, its primary and ongoing purpose is to benefit the fundraiser, with little in the way of informative or persuasive speech offered to the public; and in that case, a lower level of constitutional protection should apply. Finally, in such circumstances, depending upon the specific evidence presented, the fundraiser's unqualified representation, express or implied, that the donor's money will be used for a specific purpose—when in fact almost all of the funds will go to the fundraiser—should be sufficient to support a claim of fraud without running afoul of the First Amendment.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Supreme Court of Illinois.

Respectfully submitted,

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